THE COURT OF APPEAL

UNAPPROVED

[2024] IECA 144
Record Number: 2024/28
High Court Record Number: 2017/662P

Noonan J.

Binchy J.

Meenan J.

BETWEEN/

BARBARA NAUGHTON

APPELLANT/PLAINTIFF

-AND-

IRISH EXAMINER LIMITED

RESPONDENT/DEFENDANT

-AND-

Record Number: 2024/27
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BETWEEN/

BARBARA NAUGHTON

APPELLANT/PLAINTIFF

-AND-

INDEPENDENT STAR LIMITED

RESPONDENT/DEFENDANT

JUDGMENT (*ex tempore*) of Mr. Justice Noonan delivered on the 11th day of June, 2024

1. The appeal before the Court today is brought by the plaintiff, Ms. Naughton, against the judgment of the High Court (Phelan J.) delivered in two linked proceedings whereby the High Court set aside the renewal of the plenary summonses issued herein against Irish Examiner Limited and Independent Star Limited, respectively the publishers of the Irish Examiner and Irish Daily Star newspapers.

2. Ms. Naughton was the victim of horrific sexual abuse perpetrated upon her over a number of years by her father who was subsequently convicted of related offences and sentenced to 11 years imprisonment. In reports carried in the Irish Examiner on the 30th January, 2016 and the Irish Daily Star on the 29th January and 18th February, 2016, Ms. Naughton was identified as a member of a survivor's group who, *inter alia*, advocated for legal consequences to be visited upon persons who were aware of the relevant abuse, and in particular on mothers who were aware of abuse against their children by fathers. The plaintiff takes significant issue with these articles as she was never a member of the relevant groups but more importantly, never advocated for any form of sanction against her mother who, as far as the plaintiff is concerned, was also a victim of her father. She claims that the articles caused her much distress and upset and, in particular, have led to her being cut off by her family, including her mother, which is a source of great upset to her.

3. After the publication of these articles, it would appear that the plaintiff consulted a firm of solicitors and ultimately, two plenary summonses were issued on the 25th January, 2017, but not served. It will be seen that this was a matter of days before the expiry of the one-year time limit for the institution of defamation proceedings. As the trial judge noted,

this relatively short limitation period constitutes a recognition by the Oireachtas that there is a particular imperative in defamation proceedings to prosecute them with expedition.

4. In fact, in the circumstances hereinafter appearing, the proceedings were not served until the 27th July, 2020, some four and a half years after the publication of the articles in question.

5. It would appear that the summons against the Irish Daly Star was issued by the plaintiff's former solicitors but for some unexplained reason, the summons against the Irish Examiner was issued on the same day by the plaintiff herself. Sometime in mid 2019, the plaintiff parted company with her solicitors who served notice of discharge in July 2019. Thereafter, the plaintiff pursued the matter as a litigant in person. In that capacity, the plaintiff made an application to the High Court (Allen J.) for a renewal of the plenary summonses on the 26th of August, 2019, itself some two and a half years after the summonses were issued. This appears to have been prompted by an attempt by the plaintiff to serve the summons on the Irish Examiner by registered post on 29th July, 2019, which the paper's solicitors pointed out was invalid as the summons had expired.

6. The relevant rule in force regarding renewal at that time was Order 8, rule 1, the new version of which had been introduced by statutory instrument being the Rules of the Superior Courts (Renewal of Summons) 2018 (S.I. 482 of 2018) which came into effect in January 2019. This new rule appears to have been drafted with a view to tightening up the circumstances in which a renewal of a plenary summons would be permitted so that a new requirement to demonstrate *"special circumstances"* was introduced in the rule which provides as follows: -

> *"(1) No original summons shall be enforced for more than twelve months from the day of the date thereof, including the day of such date; but if any defendant*

therein named shall not have been served therewith, the plaintiff may apply before the expiration of twelve months to the Master for leave to renew the summons.

(2) The Master on an application made under subrule (1), if satisfied that reasonable efforts have been made to serve such defendants, or for other good reason, may order that the original or concurrent summons be renewed for three months from the date of such renewal inclusive.

(3) After the expiration of twelve months, and notwithstanding that an order may have been made under subrule (2), application to extend time for leave to renew the summons shall be made to the Court.

(4) The Court on an application under subrule (3) may order a renewal of the original or concurrent summons for three months from the date of such renewal inclusive where satisfied that there are special circumstances which justify an extension, such circumstances to be stated in the order…"

7. Order 8, rule 2 provides, as previously, that where a summons has been renewed on an *ex parte* basis, the defendant may apply to set aside the renewal.

8. As already noted, the first renewal application was made to Allen J. on the 26th August, 2019. Despite repeated attempts by the defendants and indeed the High Court to obtain sight of the affidavit of the plaintiff grounding that application, it has never been produced and the reason for that has not been explained. In any event, it is clear from the detailed judgment of Phelan J. in this matter that she went to considerable lengths to ascertain what had transpired before Allen J. and listened to the digital audio recording of the application.

9. As noted in the judgment, the application before Allen J. appears to have been advanced by Ms. Naughton on the basis of blaming her solicitors for failing to serve the summons in time due to, what she referred to in her *ex parte* docket as, *"procrastination"*. It appears that Allen J. may not have been aware of the introduction of the new rule, presumably because the plaintiff had not alerted him to it, but he refused the application on the basis that the plaintiff had failed to demonstrate a *"good reason"* for renewing the summons, which refers to the previous superseded rule which had a lower threshold for a renewal. It also appears from the judgment of Phelan J. that after Allen J. had refused the application, the plaintiff made some reference to medical grounds which he indicated he could not consider having already made his decision.

10. More than ten months later, on the 29th June, 2020 Ms. Naughton made a second renewal application to the High Court, this time to Cross J. It would appear that on this occasion, the plaintiff relied on medical grounds, rather than any particular failure on the part of her solicitors, and Cross J. accordingly granted the application. As with the previous application, it is I think clear that Cross J. was not alive to the new rule, again for the same reason, and his order does not recite any *"special circumstances"* which led to the renewal and clearly does not comply with the terms of the new rule.

11. Of critical importance in the context of this appeal is the fact that Ms. Naughton did not inform Cross J. of the fact that she had made an earlier renewal application to another judge of the High Court the previous year. Although at the hearing before Phelan J., Ms. Naughton appears to have submitted that she did inform Cross J. of the earlier application, Phelan J. observes that it is certainly not mentioned in her grounding affidavit but having listened again to the DAR recording of the hearing, she was quite satisfied that it had not been disclosed to Cross J. despite the plaintiff's contentions to the contrary.

12. In fact, a subsequent application was made a few days later to Cross J. for leave to treat a copy of the summons as an original and it was only at that stage that the plaintiff disclosed to him the earlier application which he noted should have been disclosed previously.

13. As previously noted, the summonses were served by the plaintiff on the 27th July, 2020 following the making of the renewal order by Cross J. The defendants subsequently brought the within application to set aside that order on essentially two grounds. The first is that the plaintiff had failed to demonstrate that there were *"special circumstances"* which could have justified the renewal and secondly, that the failure on the part of the plaintiff to disclose the earlier application to Allen J. when applying to Cross J. constituted an abuse of process.

14. All of the matters to which I have referred above were extensively considered in the judgment of Phelan J. under appeal and it is unnecessary for the purposes of this judgment to repeat that detail. The judge first considered the abuse of process argument and referred to an extract from the judgment of McKechnie J. in *F.G. v Child and Family Agency* [2018] IESC 28 which suggests that the making of successive applications for the same relief is in general impermissible but may be allowed where there has been a significant change of circumstances such as the availability of new evidence or perhaps a change in the law which justifies the making of a second or subsequent application. However, in saying this, McKechnie J. noted:

> *"As a rule, the existence of the previous application and the grounds upon which the application is renewed ought to be clearly and frankly disclosed not only orally, but also by way of affidavit."*

15. In the present case, Phelan J. found that the plaintiff failed to disclose the earlier application to Allen J. when making her later application to Cross J. She considered this to be an abuse of process but went on to say:

> *"67. Given that the plaintiff is a lay litigant who presented before me in a state of some distress, saying that she told Cross J. about the previous application, albeit it transpired for (sic) a review of the DAR that she only told him about it when he raised it with her having already made an order on a previous date, I have decided not to set aside the order as made on the basis that the applications constitute an abuse of process… The DAR transcript certainly suggests that he was willing to accept that the plaintiff had not intentionally misled him, and while not persuaded her omission was entirely innocent, I propose to afford her the same indulgence."*

16. It is against this conclusion that the defendants cross appeal. I am satisfied that this conclusion was, as the respondents submit, erroneous. The failure to inform Cross J. of the earlier application was, in the clearest terms, an abuse of process. The fact that the plaintiff is a litigant in person does not make it any the less so. Abuse of process does not imply *mala fides* and the fact that the plaintiff may not have understood her obligation is not material. The courts have repeatedly said that the rules apply equally to all parties, whether represented or not, and to use the old adage, ignorance of the law is not an excuse.

17. This was not a matter of discretion, or one in which the High Court was entitled to afford the plaintiff some *"indulgence"*, as it was described. It was in my view wrong to conclude that the fact that the plaintiff is a litigant in person ought to be regarded as an excusing factor. Clearly had the plaintiff been represented, the court could not conceivably have reached this conclusion and again as has been previously said, a plaintiff cannot put themselves in a better position by electing not to be represented.

18. I am therefore satisfied that the cross-appeal must be allowed and while that is dispositive of the matter, for completeness I propose to consider the other ground upon which the High Court did ultimately set aside the renewal. That is whether the plaintiff demonstrated *"special circumstances"* by reference to the medical evidence she put before the High Court which could have justified a renewal.

19. The first thing to be said about this aspect of the case is that while the application was made to Allen J. on the basis of default on the part of the plaintiff's solicitors, following refusal by him the plaintiff appears to have adverted to certain medical grounds, at a minimum suggesting that those were available to her at that time as a basis for seeking renewal, albeit not relied upon in the particular application until after it had been decided.

20. In her second application before Cross J., Ms. Naughton relied on evidently the same medical grounds so that it could not be said that this was something new that had come to light since the decision of Allen J. It is well-settled since *Henderson v Henderson* (1843) 3 Hare 100 that a plaintiff has an obligation in litigation to bring forward their whole case and cannot reserve issues for later deployment in subsequent litigation. This appears to have been what the plaintiff has attempted to do in the present circumstances.

21. However, even leaving that aside, Phelan J. carefully analysed the medical evidence that had been put before her by the plaintiff and noted that, like her evidence in relation to her interaction with solicitors, it was permeated by a degree of vagueness. At para. 78 *et seq*. the judge considered the medical report of Dr. Rajakulendran of Earls Court Medical Centre which the plaintiff today confirmed to this Court is the only direct reference in the medical records to her capacity to conduct litigation, the doctor noting that *"Her health needs placed under tremendous strain (sic) and because of this, she was unable to engage*

in legal activities for a significant period of time, including during the time of her libel matter." Commenting on this report, the judge said:

> *"78. A similar vagueness or lack of demonstrated substance affects her evidence as to her medical difficulties. She does not detail the nature of the medical condition which prevented her advancing the litigation by serving the proceedings. The medical letter she exhibits lists several 'current medical problems' and 'current medication', none of which self-evidently established that the plaintiff was unfit to pursue her proceedings. The letter does not identify a condition which prevented her progressing her claims and is not expressed in clear terms. Furthermore, the letter fails to identify the outer parameters of the period during which a medical impediment progressing proceedings could be said to have existed.*
>
> *79. Insofar as the plaintiff refers to medical appointments in a typewritten document exhibited in her replying affidavit, she only refers to appointments spanning the period between 1st January, 2017 and 31st April, 2018. Accepting for the sake of argument that a list of medical appointments could be capable of supporting the plaintiff's application, particularly if combined with a sufficiently detailed letter or a report from her treating doctors confirming that she was too unwell to progress her proceedings during the period in question, it is noteworthy that the plaintiff makes no reference in her list to any appointments for the period from April 2018 to August 2019 when her first application was made before Allen J. or from then until June 2020 when the second application was moved. Accordingly, there is no evidence of appointments throughout this period of a nature which might*

support a conclusion that the plaintiff was unable to prosecute her defamation proceedings throughout the entirety of the period, beyond the general terms of what is said in the letter from Earls Court Medical Centre in January 2020 and what the plaintiff herself shortly states on affidavit. Simply put, the medical evidence does not go anywhere near far enough to establish that the plaintiff could not have prosecuted her proceedings because of her state of health."

22. It is for the plaintiff in this appeal to demonstrate that this conclusion is erroneous as this is not, of course, a *de novo* hearing of her application. While the principles in *Hay v O'Grady* [1992] 1 IR 210 apply generally to findings of fact based on oral evidence, such findings in cases tried on affidavit must also be accorded significant weight by this Court. In *Ryanair v Biligfleuge* [2015] IESC 11, Charleton J. observed that such findings bind an appellate court unless demonstrated to be *"clearly untenable"*. I am satisfied that the plaintiff has demonstrated no basis upon which this Court could be justified in holding that these determinations on the evidence by the High Court could be regarded as untenable and indeed, it might be said that any other conclusion would in the circumstances be untenable.

23. Insofar as the plaintiff now seeks to remedy any deficiency in the evidence before the High Court by seeking to introduce new evidence in this Court by the bringing of a motion in that regard, it seems to me that the principles in *Murphy v The Minister for Defence* [1991] 2 IR 161 where, speaking for the Supreme Court, Finlay CJ said:

"(1) The evidence sought to be adduced must have been in existence at the time of the trial and must have been such that it could not have been obtained with reasonable diligence for use at the trial;

(2) The evidence must be such that if given it would probably have an important influence on the result of the case, though it need not be decisive;

(3) The evidence must be such as is presumably to be believed or, in other words, it must be apparently credible, though it need not need be incontrovertible."

24. It is clear to my mind that the appellant's attempt to introduce new evidence falls at the first *Murphy* hurdle as it is self-evident that this evidence could have been obtained with reasonable diligence for use at the hearing before Phelan J. Even were that not so, I am perfectly satisfied that the purported new evidence could not in any event be regarded as sufficient for the purposes of demonstrating *"special circumstances"*, within the meaning of the rule but as I have said already, this Court is not conducting a *de novo* hearing of the matter.

25. I should also comment briefly on the grounds of appeal and written submissions advanced by the plaintiff. She contends that she did not get a fair hearing in the High Court because the judge would not allow her to introduce the evidence she seeks now to introduce on the appeal. The second defendants' motion was served on the plaintiff on 13th April, 2021 and the first defendant's on 12th April, 2022. These did not come on for hearing before the High Court for the first time until 4th July, 2023, by which stage the medical records to which I have already referred were before the court. However, as confirmed by the plaintiff today, it was only in the course of her reply on her feet that she sought to introduce for the first time additional medical documents from Dr. Halford in particular. The judge was perfectly entitled to refuse the plaintiff liberty to re-invent the case at this very late stage but as I have already observed, I am satisfied that the introduction of this evidence would in any event have made no material difference, and there is thus no basis for the suggestion that the plaintiff was not afforded a fair hearing.

26. Further, the plaintiff now seeks to re-introduce on the hearing of this appeal arguments concerning the alleged failures on the part of her solicitors originally raised before Allen J. but not agitated in the set-aside application before Phelan J. This Court in general will not entertain new grounds of appeal not argued before the High Court save in exceptional circumstances, and there are none here. Further, in her written submissions, the plaintiff purports to give new evidence concerning these events which is clearly impermissible and must be disregarded.

27. The plaintiff in her affidavit grounding the application to introduce new evidence alludes to a further argument, namely that the new O. 8 r. 2 does not apply to these proceedings since they were issued prior to January, 2019, when the rule came into force. It is however clear from the jurisprudence on the new rule, much of which relates to proceedings commenced prior to its coming into effect, that the rule applies to any renewal application made after that time and it is immaterial when the proceedings commenced.

28. Finally, I note that as a result of further evidence put before this Court by the respondents in relation to events that have transpired since the hearing in the High Court, it would appear that the plaintiff is now suing her former solicitors, one assumes on the basis of their alleged failure to serve the proceedings in a timely fashion. If the plaintiff is correct about that, and of course I express no view, she has her remedy against that party. As was noted by Haughton J. in *Murphy v HSE* [2021] IECA 3, a default by a party's solicitors could rarely, if ever, amount to *"special circumstances"* within the meaning of the rule.

29. For these additional reasons therefore, I would dismiss these appeals.

Binchy J.: I have listened carefully to the judgment just delivered by Mr. Justice Noonan and I am in complete agreement with it. I have nothing to add to it.

Meenan J.: I too agree with the judgment delivered by Mr. Justice Noonan in this matter.